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THE FIRST AMERICAN BILL OF RIGHTS: WAS IT MARYLAND'S 1639 ACT FOR THE LIBERTIES OF THE PEOPLE?

Charles A. Rees†

I. INTRODUCTION

Which state gets the “bragging rights” for the first American bill of rights? According to constitutional law scholar Bernard Schwartz, Maryland takes the honor for its 1639 Act for the Liberties of the People.¹ Because this honor could be a kind of constitutional “gold mine” for Maryland, I review Schwartz’s claim in Part II, “Staking the Claim,”² evaluate the claim in Part III, “Mining the Claim,”³ and reach my conclusions in Part IV, “Claiming the Mine.”⁴ I conclude that Maryland gets the “bragging rights” for the first American bill of rights, not for the 1639 Act, but for a different act – either an earlier, 1638 Act for the Liberties of the People⁵ or, more likely, another 1639 statute, An Act ordeining certain Laws for the Goverment of this Province.⁶

II. STAKING THE CLAIM

Constitutional law scholar Bernard Schwartz, documenting the history of the Bill of Rights of the United States Constitution beginning with the English Magna Carta (1215), claimed that the “first American Bill of Rights,” enacted by a colonial assembly, was Maryland’s Act for the Liberties of the People in 1639.⁷ The 1639 Act for the Liberties of the People reads:

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1. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 67 (1971) [hereinafter SCHWARTZ].

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. *See infra* notes 162, 164-73 and accompanying text.

6. *See infra* notes 163, 175-214 and accompanying text.

7. 1 SCHWARTZ, *supra* note 1, at 4, 67. This two-volume work contains English and American documents and Schwartz’s commentary. Schwartz’s claim is repeated in his two derivative works – the same documents and commen-

Be it Enacted By the Lord Proprietarie of this Province of and with the advice and approbation of the ffreemen of the same that all the Inhabitants of this Province being Christians (Slaves excepted) Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saving in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province)

And Shall not be imprisoned nor disseised or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province saveing to the Lord proprietarie and his heirs all his rights and prerogatives by reason of his domination and Seigniorie over this Province and the people of the same This Act to Continue till the end of the next Generall Assembly⁸

While the settlers' rights as Englishmen were typically protected under a colonial charter granted by the King, those rights were only generally stated.⁹ However, Maryland's 1639 Act, passed by the settlers' own assembly, gave more specific content to these rights.¹⁰

tary with illustrations in five volumes, BERNARD SCHWARTZ, 1 THE ROOTS OF THE BILL OF RIGHTS 67 (1980), and just the commentary in an expanded and revised narrative form, BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 33 (1977).

8. 1 SCHWARTZ, *supra* note 1, at 68 (citing 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, 1637-1664, 41 (W. H. Browne, ed. 1883)).

9. *Id.* at 49-50.

10. *Id.* at 67.

I take Schwartz's claim seriously. He was a prolific scholar¹¹ and an honored teacher of constitutional law.¹² Other scholars have repeated his claim.¹³ Let us now review Schwartz's claim.

11. In addition to the works in *supra* note 7, Schwartz has published several other books on constitutional law. BERNARD SCHWARTZ, CONSTITUTIONAL LAW (Norman Redlich & John Attanasio eds., 3d ed. 1996); BERNARD SCHWARTZ, FREEDOM OF THE PRESS (1992); BERNARD SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK (2d ed. 1979); BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877 (1973); BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND (1967); BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (1963); BERNARD SCHWARTZ, THE REINS OF POWER: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (1963). He has also published many law review articles on constitutional law. See, e.g., Bernard Schwartz, *A Presidential Strikeout, Federalism, RFRA, Standing, and a Stealth Court*, 33 TULSA L.J. 77 (1997); Bernard Schwartz, *Term Limits, Commerce, and the Rehnquist Court*, 31 TULSA L.J. 521 (1996); Bernard Schwartz, *"Brennan vs. Rehnquist"—Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213 (1994); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587 (1990); Bernard Schwartz, *National League of Cities v. Usery Revisited—Is the Quondam Constitutional Mountain Turning Out to Be Only a Judicial Molehill?*, 52 FORDHAM L. REV. 329 (1983). Additionally, he has published widely in areas related to constitutional law, such as the United States Supreme Court, legal history, civil rights, legal theory, legal biography, comparative law, the legal profession, and administrative law.
12. Schwartz taught 45 years at the New York University School of Law, where he was named Edwin D. Webb Professor of Law. Then, before his death in 1997, he taught five years at the University of Tulsa College of Law, as Chapman Distinguished Professor of Law. His main subjects were administrative law and constitutional law. Biography of Bernard Schwartz available at <http://www.law.nyu.edu/magazines/autumn98/faculty/newsmakers.html> (last visited May 16, 2002).
13. ROBERT S. PECK, THE BILL OF RIGHTS & THE POLITICS OF INTERPRETATION 39, 49 n.4 (1992); see also *Balt. Sun Co. v. Mayor of Balt.*, 359 Md. 653, 661, 755 A.2d 1130, 1134-35 (2000); *Telnikoff v. Matusevitch*, 347 Md. 561, 585 n.22, 702 A.2d 230, 242 n.22 (1997).

Other scholars, citing Schwartz, have made a similar but less explicit claim. JAMES MACGREGOR BURNS & STEWART BURNS, A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA 34, 480 n.34 (1991); 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6344 n.777 (1997); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1094 & n.99 (2000); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 963 & n.99 (1990); Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 99 & n.26 (1993); Maurice Portley, *The Due Process Clause of the Fifth Amendment*, 28 ARIZONA ATTORNEY, at 13 & n.5 Dec. 28, 1991.

Still, other scholars, not citing Schwartz, have made a claim like his. COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 308 (Donald S. Lutz ed. 1998); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 205 (1999); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 23-24 (Collier Books 1961); Gregory A. Stiverson, *"To Maintain Inviolable Our Liberties"—Maryland and the Bill of Rights*, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF

III. MINING THE CLAIM

There are a number of interpretive problems with Bernard Schwartz's claim that Maryland's 1639 Act for the Liberties of the People was the "first American Bill of Rights."¹⁴ These problems include: (1) What was Schwartz's claim about the "first American Bill of Rights?" (2) Was it Maryland's 1639 Act for the Liberties of the People?

A. *What Was Schwartz's Claim About the "[F]irst American Bill of Rights?"*

To interpret Schwartz's claim about the "first American Bill of Rights" properly, it must be determined what Schwartz meant by the terms "first," "American," and "Bill of Rights." We will consider each of these terms.

1. Schwartz's Claim About the *First* American Bill of Rights

In his study of the Bill of Rights, Schwartz took historical and analytical approaches. He organized his documentary history by time, starting with English antecedents, working through colonial charters and laws, continuing with revolutionary-era declarations and state constitutions, and proceeding through the period of the Articles of Confederation, including the debates and ratification of the Constitution.¹⁵

AMERICAN LIBERTIES 373 (Patrick T. Conley & John P. Kaminski eds. 1992) (reporting on an act of an earlier assembly, but quoting the 1639 Act and referring to the Massachusetts Body of Liberties [1641] as two years later); THE CONSTITUTIONAL LAW DICTIONARY 9 (Ralph Chandler et al. eds. 1985); Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L.J. 43, 48 (1993).

Additional scholars have cited the 1639 Maryland Act as though it was duly enacted. GEORGE W. BURNAP, LIFE OF LEONARD CALVERT, FIRST GOVERNOR OF MARYLAND 173 (1846); 2 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1182-83 (W. Keith Kavenagh ed. 1983); DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 20, 61 (1988); MAGNA CARTA IN AMERICA 108 (David V. Stivison ed. 1993); ELIHU S. RILEY, A HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND, 1635-1904, 9 (Kennikat Press 1972); 1 J. THOMAS SCHARF, HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY 169 (Tradition Press 1967); SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 101 (Richard L. Perry ed. 1978) [hereinafter SOURCES OF OUR LIBERTIES]; Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2178 & n.96 (1998); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 n.16 (1995); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1761 & n.192 (1996); Stephen E. Meltzer, Comment, *Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity*, 27 NEW ENG. L. REV. 749, 761 & n.100 (1993).

14. See *supra* note 7 and accompanying text.

15. See generally 1 SCHWARTZ, *supra* note 1.

Schwartz then took up the legislative history of the Bill of Rights and its ratification by the states.¹⁶

At the end of his work, Schwartz analyzed the source of each discrete right in the Bill of Rights in a one-page table detailing the "First Document Protecting," the "First American Guarantee," and the "First Constitutional Guarantee" of each right.¹⁷

a. Schwartz's Claim Is Too Big

In the context of his work, Schwartz's claim that Maryland's 1639 Act for the Liberties of the People is the *first* American bill of rights may be both too big and too small. The claim may be *too big*, because Schwartz's work only documents the English and United States constitutional traditions,¹⁸ despite the fact that people from other countries and legal traditions (notably, Scandinavia, Italy, Spain, Portugal, France, and the Netherlands) explored and settled in the Americas.¹⁹ However, Schwartz explained that settlers from countries other than England did not take with them the rights of their home countries, like the English settlers did.²⁰ The claim may also be *too big* because "American" may refer to North,²¹ Central, and South America; not just the area that is presently the United States. Furthermore, there were "native Americans" in what is currently the United States when the Europeans arrived.²² Finally, even the "history" has a history. The road from the United States back to England leads on to Greece and Rome²³ and elsewhere.²⁴

16. See generally *id.*

17. *Id.* at 1204.

18. See *supra* notes 15-16 and accompanying text.

19. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9-10 (1977) ("The fact that American law dates from the end of the eighteenth century has served to differentiate our legal system not only from that of England but from those of the Western European countries with which we share a common intellectual tradition.").

20. 1 SCHWARTZ, *supra* note 1, at 49.

21. Schwartz sets forth a document, *Address to the Inhabitants of Quebec* (1774), but that document is not a statement of rights by the inhabitants of Quebec, but an expression by the First Continental Congress of the fundamental rights of inhabitants of twelve of the thirteen colonies which later became the United States. 1 SCHWARTZ, *supra* note 1, at 221-27.

22. Cf. *THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION* 29-31 (Bruce Elliott Johansen ed., 1998) ("Bill of Rights, Native American Precedents"). Interestingly, Schwartz documents Thomas Paine, writing, somewhat whimsically, about an "Indian Bill of Rights" – principles of natural liberty for people in a state of nature without any government. 1 SCHWARTZ, *supra* note 1, at 315 (quoting *Thomas Paine on a Bill of Rights, 1777*, in *THE COMPLETE WORKS OF THOMAS PAINE* (P.S. Foner ed. 1945)).

23. SUSAN FORD WILTSHIRE, *GREECE, ROME, AND THE BILL OF RIGHTS* 4 (1992) ("Almost all of the provisions of the Bill of Rights reflect civic practices first developed by the Greeks and Romans.").

24. See *THE HUMAN RIGHTS READER* xv-xix, 1-72 (Micheline R. Ishay ed., 1997) for an essay and documents on the early origins of human rights from the

b. *Schwartz's Claim Is Too Small*

Schwartz's claim that Maryland's 1639 Act is the *first* American bill of rights may also be *too small*. As mentioned earlier, Schwartz's work included a table, which detailed the source of each discrete right in the Bill of Rights.²⁵ For each of the twenty-six rights, Schwartz set forth the first document that protected that right, the first American guarantee of that right, and the first constitutional guarantee of that right.²⁶ There are also many "firsts" as to the Bill of Rights as a whole. Schwartz's methodology suggested calling the Magna Carta (1215)²⁷ the first English bill of rights, the Petition of Right (1628)²⁸ the first English legislated bill of rights, and the Bill of Rights (1689) the first English constitutional document formally bearing the title "Bill of Rights."²⁹

In America, Schwartz recognized many "firsts" following Maryland's 1639 Act for the Liberties of the People, the "first American Bill of Rights."³⁰ Schwartz named The Massachusetts Body of Liberties (1641) "the first detailed American Charter of Liberties."³¹ Oddly, because he discussed it with Maryland's 1639 Act, Schwartz called that Body of Liberties "the first American attempt" to set forth "fundamental rights . . . in a written instrument enacted by the people's representatives"³² Additionally, Schwartz noted that a New York printing of the Declaration and Resolves of the First Continental Congress (1774), titled "The Bill of Rights," was "the first specific use of

Bible to the Middle Ages. Schwartz's omission of the Scriptures as a source for the Bill of Rights is noteworthy in light of three documents he includes in his history. First, pursuant to the Fundamental Orders of Connecticut (1639), the word of God requires that, where people are gathered together, a government be established according to God to maintain peace and union. 1 SCHWARTZ, *supra* note 1, at 62-63. Second, The Maryland Act Concerning Religion (1649) assumed that Maryland was a Christian commonwealth where religion and the honor of God should be considered first. *Id.* at 91. Third, the Boston Committee of Correspondence prepared a statement, The Rights of the Colonists and a List of Infringements and Violations of Rights (1772), which set forth the rights of colonists as Christians, found in the words of Jesus in the New Testament, as well as the rights of colonists under natural law and the rights of colonists as Englishmen under the common law of England. *Id.* at 200-03.

25. 2 SCHWARTZ, *supra* note 1, at 1204.

26. *Id.*

27. See 1 SCHWARTZ, *supra* note 1, at 4-16.

28. See *id.* at 17-21.

29. *Id.* at 40-46.

30. *Id.* at 67. An earlier document, the Fundamental Orders of Connecticut (1639), the first "enforceable, written Constitution drawn up by the people to be governed" in the American colonies, "did not contain any guarantees of individual liberties" *Id.* at 62. Additionally, the Mayflower Compact (1620) was written earlier but is much less detailed. *Id.* at 62, 69.

31. *Id.* at 69.

32. *Id.* at 71.

the term in connection with an American document.”³³ Schwartz designated the Virginia Declaration of Rights (1776) as “the first true Bill of Rights in the modern American sense,” because it was contained in a constitution adopted by a convention elected by the people.³⁴ Schwartz honored the New Hampshire Bill of Rights (1783) as “the first American constitutional document formally to bear the title of Bill of Rights.”³⁵ Furthermore, he recognized the Northwest Ordinance (1787) as “the first Bill of Rights enacted by the Federal Government.”³⁶ Of course, Schwartz’s work on the “Bill of Rights” was about the federal Bill of Rights,³⁷ the first ten amendments to the United States Constitution, proposed by Congress in 1789 and ratified by the states by 1791.³⁸

2. Schwartz’s Meaning of an *American* Bill of Rights

In his work regarding the federal Bill of Rights, Schwartz divided the pre-revolutionary history of the federal Bill of Rights into: (1) “English Antecedents,” which included, Magna Carta (1215), Petition of Right (1628), and Bill of Rights (1689); and (2) “Colonial Charters and Laws,” which included royal charters of Virginia, Maryland, Rhode Island, and Providence Plantations, and fundamental laws drawn up by the representative colonial legislatures in Connecticut, Maryland (including the 1639 Act for the Liberties of the People), Massachusetts, and New York.³⁹ The “English Antecedents” were written by and for Englishmen.⁴⁰ The colonial charters, although recognizing the rights of settlers in America, were grants by the English monarch.⁴¹ The fundamental laws, such as Maryland’s 1639 Act, were drawn up by representative colonial legislatures and were “American” – homegrown in America, by and for Americans.⁴²

33. *Id.* at 214.

34. *Id.* at 231, 233-34.

35. *Id.* at 374.

36. *Id.* at 385.

37. *Id.* at v, 3; 2 SCHWARTZ, *supra* note 1, at 981-1204.

38. 1 SCHWARTZ, *supra* note 1, at v.

39. *Id.* at v, vii-ix, 3-175.

40. *See id.* at 3-7, 17-19, 40-41.

41. *Id.* at 49-53; *cf. id.* at 162 (noting the “guarantees contained in Charters granted by the Crown” or “guarantees contained in instruments issued by Colonial Proprietors” as types of colonial antecedents of the federal Bill of Rights).

42. *See id.* at 50-51, 67-68. Three scholars have concluded that Maryland’s 1639 Act for the Liberties of the People was not “homegrown” in America, but was drawn up by the Proprietor in England and sent to Maryland. One scholar, citing no sources for that proposition, concluded that the Act was one of several sent over by the Proprietor for the 1639 session of the General Assembly. MICHAEL JAMES GRAHAM, *LORD BALTIMORE’S PIOUS ENTERPRISE: TOLERATION AND COMMUNITY IN COLONIAL MARYLAND 1634-1724*, 37 (1984). A second scholar, also citing no sources, theorized that the 1639 Act was one of thirty-six failed bills, which were probably drafted in En-

Schwartz uses the term "American" in his claim about the "first American Bill of Rights" in three notable ways. First, by "American," Schwartz means the work of English settlers in the area that is now the United States.⁴³ Second, Schwartz's claim assumes that America was

gland, but were too complex to suit the General Assembly. BERNARD C. STEINER, *BEGINNINGS OF MARYLAND, 1631-1639*, 107 (J.M. Vincent et. al. eds., 1903). The third scholar, also citing no sources for the proposition, apparently concluded that all of the thirty-six bills were not passed, but were reported in full in the proceedings of the 1639 General Assembly, and were the Proprietor's draft of a code of laws first presented to the 1638 legislative session. THOMAS O'BRIEN HANLEY, *THEIR RIGHTS AND LIBERTIES: THE BEGINNINGS OF RELIGIOUS AND POLITICAL FREEDOM IN MARYLAND 88-94* (1959). The proceedings of the 1638 General Assembly do not show that the Act for the Liberties of the People was drawn up by the Proprietor. Those proceedings indicate that twelve draft laws, not titled or reported, transmitted by the Proprietor, were read and debated a first time, read and debated a second time, put to vote without a third reading, but failed to pass. 1 *ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 6-9* (W. H. Browne, ed. 1883) [hereinafter 1 *ARCHIVES*]. The General Assembly agreed to reconsider these twelve draft laws later in the session, when they were read a first time, a second time, and were voted to be considered separately on the third reading. *Id.* at 11. However, the proceedings do not make clear the final disposition of the Proprietor's draft laws. *Id.* A letter dated April 25, 1638 from the Governor to the Proprietor indicates that the draft laws failed to pass. *NARRATIVES OF EARLY MARYLAND 1633-1684*, 156 (Clayton Colman Hall ed., 1910). On the other hand, a bill "for the liberties of the people," titled but not reported, later was read a first time, read a second time, and read a third time and *passed*. 1 *ARCHIVES, supra*, at 15, 20. However, the 1638 Act for the Liberties of the People was apparently vetoed by the Proprietor on the ground that only he and his Governor had the power to propose laws. See 3 *ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND 1636-1667*, 50-51 (William Hand Browne ed., 1885). I do not believe that Hanley's internal evidence that the 1639 Act for the Liberties of the People was drawn up by the Proprietor is very persuasive. Hanley concluded that the Proprietor narrowed the colonists' rights under the colonial Charter by tying them to English statutes (some of which *violated* common law rights), as well as to English common law, and by saving to the Proprietor his own "rights and prerogatives." HANLEY, *supra*, at 95-96; see also *infra* Part III.B.2.c. However, the Act provided for the inhabitants of the Province, not all the statute law and common law of England, but those laws providing rights for Englishmen. See *supra* text accompanying note 8 for the text of the Act for the Liberties of the People. Too, the General Assembly's omnibus Act ordaining certain Laws for the Government of this Province, which, according to Hanley, was prepared by a committee of the General Assembly to improve on the Proprietor's draft code, see HANLEY, *supra*, at 94-96, also saved to the Proprietor "his rights and prerogatives." 1 *ARCHIVES, supra*, at 83. Furthermore, the General Assembly regularly considered bills for the liberties of the people, not only in the 1638 and 1639 sessions, when the Proprietor was regularly initiating legislation, but also in later sessions, when the initiative was ordinarily exercised by the General Assembly itself. See, e.g., 1 *ARCHIVES, supra*, at 94 (1640), 132-36 (1642), 224 (1647-48), 275 (1650). Indeed, the introduction of such bills might seem to be of more interest to the freemen of the General Assembly, claiming their liberties, than to the Proprietor, against whom those rights typically would be claimed.

43. See *supra* notes 18-20 and accompanying text.

not only a geographical place but also a people or political entity capable of having a bill of rights of its own.⁴⁴ However, this was not so at the time of the 1639 Maryland Act. Schwartz himself recognized that the early American bills of rights were drawn up by local legislatures, established under the authority of colonial charters,⁴⁵ and “were legally subject to the overriding authority of the British government.”⁴⁶ However, in 1776, the American Revolution “ensured the triumph of the American conception.”⁴⁷ Third and relatedly, Schwartz’s claim assumes that the rights of Englishmen, assured by the 1639 Maryland Act, were “American” rights when possessed by Americans.⁴⁸ Again, to be valid, this claim required a revolution.

3. Schwartz’s Meaning of *Bill of Rights*

In his work regarding the federal Bill of Rights, Schwartz described the characteristics of a “Bill of Rights” in the American sense. First, Schwartz described it as a declaration of rights in a fundamental law.⁴⁹ Second, the Bill of Rights defines the rights protected.⁵⁰ Third, a bill of rights is drawn up by a representative legislative assembly.⁵¹ Fourth, the rights enumerated in the Bill of Rights are enforceable by the courts.⁵²

a. *Declaration of Rights in a Fundamental Law*

Schwartz viewed the 1639 Maryland Act for the Liberties of the People as a “Bill of Rights,” a *declaration of rights in a fundamental law*.⁵³ The 1639 Maryland Act was written:⁵⁴ its title, “Act for the Liberties of the People,” suggested a declaration of rights.⁵⁵ As we shall see, the Act defined rights.⁵⁶ The Act was one of many attempts by Maryland colonists to establish their rights as Englishmen.⁵⁷ While the Act was

44. See, e.g., 1 SCHWARTZ, *supra* note 1, at 3.

45. *Id.* at 49-51, 67.

46. *Id.* at 50.

47. *Id.* at 180, 181.

48. See *id.* at 67-68.

49. See *id.* at 179-81.

50. *Id.* at 179-80.

51. See *id.* at 179.

52. *Id.* at 53-54; see generally *id.* at 4-7, 17-19, 22-23, 40-41, 49-52, 62, 67-71.

53. *Id.* at 67.

54. *Id.* at 181 (emphasizing the importance of written law, not just unwritten principles).

55. Naming of “bills of rights” can be significant. See *supra* notes 26-37 and accompanying text.

56. See *infra* Part III.A.3.b.

57. See 1 SCHWARTZ, *supra* note 1, at 67-68 (noting a later failed attempt by the Maryland General Assembly to adopt the Magna Carta). An earlier act for the liberties of the people, the text of which is lost, passed at the January-March 1638 session of the legislature, was apparently vetoed by the Proprietor, who believed that only he and his Governor had the power to propose laws. See *supra* note 42. The attempts by Maryland colonists to extend their

ordinary legislation, not part of a charter, constitution, or other foundation document,⁵⁸ the rights it described were fundamental and basic.⁵⁹ Those rights were not intended to be just a declaration of principles, but rather enforceable "law."⁶⁰ However, Schwartz failed to mention that the fundamental nature of the 1639 Maryland Act was limited in three significant ways. First, the rights declared were expressly subject in some way to the Proprietor's prerogative.⁶¹ Second, the Act was temporary, continuing only until the end of the next General Assembly.⁶² Third, the Act was never duly enacted.⁶³

b. Definition of the Rights Protected

"Elementary" or rudimentary as it was, the 1639 Maryland Act *defined what rights were protected*.⁶⁴ While the colonial charters merely stated that the colonists were "entitled to the rights of Englishmen," the Act gave "those rights specific content."⁶⁵ The Act specified English common law, as well as statutory law, as a source of those rights.⁶⁶ Additionally, the Act paraphrased Chapter 39 of the Magna Carta, known now as "due process."⁶⁷ Thus, these were "basic rights,"⁶⁸ although they were not described in detail as they were in the later Massachusetts Body of Liberties (1641).⁶⁹

rights as Englishmen were later comprehensively set forth in a committee report, approved by the Lower House of the General Assembly on October 18, 1723. 34 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND OCTOBER, 1720-OCTOBER, 1723, 661-79 (Clayton Colman Hall ed., 1914) [hereinafter 34 ARCHIVES].

58. See 1 SCHWARTZ, *supra* note 1, at 50, 95, 125, 179-81, 229, 234 (distinguishing charters, constitutions, and other foundation documents from ordinary legislation).

59. *Id.* at 67.

60. *Id.*

61. See *supra* text accompanying note 8 for the Act for the Liberties of the People (1639). Cf. 1 SCHWARTZ, *supra* note 1, at 18 (noting that the English Petition of Right of 1628, enacted as a statute, was not weakened by any saving of prerogative right).

62. See *supra* note 8 and accompanying text for the Act for the Liberties of the People (1639).

63. See *infra* Part III.B.2.

64. 1 SCHWARTZ, *supra* note 1, at 67.

65. *Id.*

66. *Id.* at 68.

67. *Id.* This provision of the Magna Carta was its most important provision. Cf. MD. CONST., DECL. OF RTS. art. 24 (1981) (securing the right of due process in Maryland).

68. See 1 SCHWARTZ, *supra* note 1, at 67; cf. *id.* at 70 (noting that The Massachusetts Body of Liberties of 1641 was a code of fundamental laws because it resembled the Magna Carta); *id.* at 180-81 (noting that the new state constitutions generally contained "fundamental laws" or "higher laws").

69. *Id.* at 69, 71.

c. Drawn up by a Representative Assembly

A representative assembly drafted the 1639 Maryland Act.⁷⁰ The Act was not the grant of an English monarch, an act of grace that could be amended or revoked at the will of the grantor.⁷¹ Rather, the Act was one of self-government by the General Assembly of Maryland, a body that claimed at least some of the privileges and powers of the English Parliament.⁷² Apparently, the fact that the 1639 Act was an act of ordinary legislation drawn up by a legislature, not a constitution drawn up by a convention specially elected for that purpose⁷³ and ratified by the people,⁷⁴ is not fatal to Schwartz's claim for the Act. However, elsewhere in Schwartz's work are suggestions that there were limitations on the Maryland colonists' self-government. First, the right to a popular legislative assembly was granted as a matter of grace by an English monarch⁷⁵ - by Article VII of the Charter of Maryland (1632) from King Charles I to Lord Baltimore.⁷⁶ Second, the Maryland General Assembly included not only representatives of the freemen, but all gentlemen and the members of the Proprietor's Council, individually.⁷⁷ Third, any act of Maryland's General Assembly was subject to the Proprietors veto.⁷⁸

d. Rights Enumerated Are Enforceable by the Courts

Schwartz viewed the rights enumerated in the Maryland Act for the Liberties of the People as enforceable by the courts. Apparently, Schwartz based this view on the fact that the rights set forth in the Act

70. *Id.* at 67; *infra* notes 72, 76-77 and accompanying text.

71. *See generally* 1 SCHWARTZ, *supra* note 1, at 50, 180.

72. *See* 1 ARCHIVES, *supra* note 42, at 82; *see also id.* at 8, 10, 12, 14 (providing the proceedings of the January-March 1638 General Assembly)

73. *See generally* 1 SCHWARTZ, *supra* note 1, at 30, 180, 231, 251.

74. *See id.* at 337 (noting that the proposed Massachusetts constitution of 1778 was drawn up by the legislature but rejected by the people); *see also id.* at 62, 69 (discussing the Mayflower Compact of 1620, a covenant of the people); *id.* at 62 (noting that the Fundamental Orders of Connecticut of 1639 was a constitution drawn up by the people to be governed).

75. *See supra* note 71 and accompanying text.

76. *See supra* note 39 and accompanying text.

77. 1 ARCHIVES, *supra* note 42, at 27-31 (listing the names of representatives elected to the General Assembly); *cf.* 1 SCHWARTZ, *supra* note 1, at 169 (noting that the Pennsylvania Charter of Privileges of 1701 excluded members of the Proprietor's Council from direct participation in legislation).

78. *See* 1 ARCHIVES, *supra* note 42, at 31 (noting Lord Baltimore's letter, dated August 21, 1638, to his brother the Governor); *see also* 1 SCHWARTZ, *supra* note 1, at 50 (noting that colonial laws were subject to the overriding authority of the British government); *id.* at 163 (discussing the 1684 veto of New York Charter of Liberties and Privileges of 1683 by the Duke of York). *But cf. id.* at 251 (noting that with independence brought legal authority to draw up constitutions and bills of rights free of any grant of authority from the crown and free of British prerogative).

were not just mere declarations of moral principles.⁷⁹ The rights of colonists under English common law, statute, and the right to due process were "laws" that could be enforced by the courts⁸⁰ even against the government.⁸¹

Thus, under the Maryland Act for the Liberties of the People, there was a very rudimentary system of checks and balances and, perhaps, even judicial review.⁸² However, the 1639 Maryland Act was unenforceable. As we have already seen, the Act by its terms was subject in some way to the Proprietor's prerogative⁸³ and was temporary in duration.⁸⁴ The nature of the Act was just ordinary legislation,⁸⁵ not "higher law," such as a constitution, supreme over legislation or other governmental actions.⁸⁶ Also, as we shall see, the Act was never duly enacted.⁸⁷

Having reviewed what Schwartz meant by the "first American Bill of Rights," the next inquiry is whether that honor fits Maryland's 1639 Act.

79. Cf. 1 SCHWARTZ, *supra* note 1, at 181 (noting that the first state constitutions were binding); *id.* at 403 (noting that the federal Bill of Rights was enforceable by the courts). But cf. *id.* at 23 (noting that the proposed English Agreement of the People of 1649 was written in "hortatory terms"); *id.* at 53-54 (discussing the "bare declaration" of colonist's rights in the Virginia Charter of 1606).

80. See *id.* at 67-68. The evidence (in commissions and instructions to judges and in citations to criminal and civil judicial proceedings) that English law was applied in Maryland colonial courts, was later comprehensively set forth in a committee report, approved by the Lower House of the General Assembly on October 18, 1723. See 34 ARCHIVES, *supra* note 57, at 673-79.

81. Cf. 1 SCHWARTZ, *supra* note 1, at 4-7 (discussing the Magna Carta as an early attempt to set out fundamental rights assumed to the people as "above the state"). The Magna Carta was the product of a conflict between King John and his barons. *Id.* at 4-5. The 1639 Maryland Act was the product of a conflict between the Proprietor and his colonists over who had the primary role in initiating legislation. *Id.* at 67.

82. See *id.* at 182-83 (noting that the doctrine of *Dr. Bonham's Case* in 1610 was that acts of the government, contrary to law, were void); cf. *id.* at 23, 403 (noting that the framers established the systems of checks and balances and judicial review in American state and federal constitutions).

83. See *supra* note 61 and accompanying text.

84. See *supra* note 62 and accompanying text.

85. See *supra* note 55 and accompanying text.

86. Cf. 1 SCHWARTZ, *supra* note 1, at 125 (noting that the Concessions and Agreements of West New Jersey of 1677 came "very close" to the seminal notion of a binding, written constitution); *id.* at 179 (discussing revolutionary declarations and constitutions generally); *id.* at 182 (discussing practicality and enforceability of the federal Bill of Rights); *id.* at 214 (discussing effort by colonists to embody their rights in the Declaration and Resolves of the First Continental Congress of 1774); *id.* at 229 (noting that the Resolution of the Second Continental Congress of 1776 for the first time placed individual rights upon a firm constitutional foundation, vested with the status of supreme law); *id.* at 403 (noting that state and federal constitutions were adopted as the supreme law in the different states).

87. See *infra* notes 93-159 and accompanying text.

B. Was Maryland's 1639 Act for the Liberties of the People the First American Bill of Rights?

In critiquing Schwartz's claim, the interpretative problems are: (1) whether the Act was dated 1639, and (2) whether it was duly enacted.

1. Was the Act for the Liberties of the People Dated 1639?

Maryland's 1639 Act for the Liberties of the People was the act of a session of the General Assembly of Maryland meeting during a period of less than a month from February 25 to March 19, "1638/9."⁸⁸ Curiously, the call for that assembly was dated December 21, 1638. However, the subsequent summons for the attendance of gentlemen were issued January 18, 1638; the summons for freemen to elect representatives from their local hundreds were given February 11, 1638; the returns of the elections were dated variously from February 14 to 21, 1638; and a letter of August 21, 1638 from the Proprietor was read on February 25, 1638, the first day of the assembly.⁸⁹

Before 1752, Britain and its American colonies used an "old style" Julian calendar with a new year beginning on March 25.⁹⁰ Beginning in 1752, Britain and its American colonies used a "new style" or Gregorian calendar with a new year beginning on January 1.⁹¹ Thus, the "1638/9" Act for the Liberties of the People was dated 1638 (old style) and 1639 (new style).⁹² Therefore, the Act may properly be dated 1639, for that is the modern way of dating an act of an assembly meeting February 25 to March 19, 1638. The new style dating will be used in this Article.

2. Was the Act for the Liberties of the People Duly Enacted?

Schwartz spoke of Maryland's 1639 Act for the Liberties of the People as though it was duly enacted. He discussed the Act in the context of the American settlers, through "the enactment of statutes" by their elected legislators, defining the colonists' basic rights.⁹³ Additionally, he called the 1639 Act an "Act" that "the Maryland General Assembly

88. 1 ARCHIVES, *supra* note 42, at 25-39 (providing the debates from the Assembly Proceeding), *id.* at 41 (providing the text of the Act for the Liberties of the People).

89. *Id.* at 27-32.

90. See *id.* at lviii; see also 28 ARCHIVES OF MARYLAND: PROCEEDINGS OF THE COUNCIL OF MARYLAND 1732-1753 (William Hand Browne ed., 1908) [hereinafter 28 ARCHIVES].

91. 28 ARCHIVES, *supra* note 90, at xi, 550 (quoting Governor Ogle's letter notifying the Council of the new law); An Act for Regulating the Commencement of the Year, and for the Correcting the Calendar Now in Use 1751, 24 Geo. 2, c. 23, § 1 (Eng.). The Calendar Act was expressly applicable to British dominions in America. *Id.*

92. See CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND 1634-1776, 30-31 n.8 (1980).

93. 1 SCHWARTZ, *supra* note 1, at 67.

approved.”⁹⁴ Then, Schwartz contrasted the 1639 Act with a later Maryland legislative attempt to define the colonists’ rights, an attempt that was disallowed by the crown during the period that the colony was under the authority of the British monarch, not under the authority of the Proprietor.⁹⁵

a. Evidence of Enactment

There is evidence that Maryland’s 1639 Act for the Liberties of the People was duly enacted. It was set forth in full in the form of a due enactment in the primary source book of early Maryland laws and is entitled an “Act.”⁹⁶ Additionally, it has an enactment clause: “Be it Enacted By the Lord Proprietarie of this Province of and with the advice and approbation of the ffreemen of the same that . . .”; and it has an expiration date: “This Act to Continue till the end of the next Generall Assembly.”⁹⁷ In the “Calendar of State Archives” in the same book of laws, the 1639 Act is presumably one of “38 Acts in full” of the proceedings of the 1639 session of the General Assembly.⁹⁸ The Act is indexed in that book of laws among the “Titles of Bills Passed,”⁹⁹ as well as among the “Titles of Bills Read.”¹⁰⁰ Further, when a committee of the Maryland General Assembly in 1723 reviewed provincial records to see whether English law was received in the colony, it listed as evidence of that reception certain “Acts of Assembly,” including the 1639 Act.¹⁰¹

There is also scholarly support for Schwartz’s assumption that Maryland’s 1639 Act for the Liberties of the People was duly enacted. As we have seen, some scholars repeat Schwartz’s claim that the 1639 Act was the “first American Bill of Rights.”¹⁰² Others, citing Schwartz, have made similar, but less explicit claims.¹⁰³ Still others, not citing

94. *Id.*

95. *Id.* at 68.

96. 1 ARCHIVES, *supra* note 42, at 41.

97. *Id.* For the text of the Act for the Liberties of the People, see *supra* text accompanying note 8.

98. 1 ARCHIVES, *supra* note 42, at xxvi; see also *id.* at 40-84 (setting forth the thirty-eight acts).

99. *Id.* at 548.

100. *Id.* at 544.

101. See 34 ARCHIVES, *supra* note 57, at 663. The Act is recorded as “made the 19th day of March 1638 . . .” *Id.* The Act, noted in the committee report, was, except for the absence of the last clause setting forth the expiration date, substantially the same as the Act set forth above. See *supra* note 8 and accompanying text. March 19, 1638 is the last day of the legislative session, after which the Act was reported with other acts of the session in the book of laws. 1 ARCHIVES, *supra* note 42, at 39-84. March 19, 1638 (old style) in 1638 or 1723 would likely be called March 19, 1639 (new style) today. See *supra* notes 88-92 and accompanying text.

102. See *supra* note 13.

103. See *supra* note 13.

Schwartz, have made claims like his, and additional scholars have cited the 1639 Act as though it was duly enacted.¹⁰⁴

b. Evidence that the Act Was Never Duly Enacted

There is evidence that Maryland's 1639 "Act" was never duly enacted. According to the proceedings of Maryland's General Assembly, the Act was a "bill" "For the Liberties of the People," which had a first reading,¹⁰⁵ then a second reading,¹⁰⁶ but never had a third reading and was never passed by vote of the General Assembly. Additionally, it was never undersigned by the Secretary of the Province after it was written that "the freemen have assented" and "the Lord Proprietary willeth that this be a Law," which were procedural steps required by the rules of order for the General Assembly.¹⁰⁷ Also, the 1639 Act was one of thirty-six reported after the following entry in the proceedings of the General Assembly: John Lewger, the Secretary of the Province, entered a "[m]emorandum that these bills were engrossed to be read the third time but were never read nor passed the house."¹⁰⁸

By contrast, consider an omnibus Act, which was the principal product of the same 1639 legislative session. According to the proceedings of the General Assembly, a "Bill for the Government of the Province," had three readings, was passed by vote of the General Assembly, and was assented to by the Lieutenant General in the name of the Lord Proprietary.¹⁰⁹ The measure was set forth as An Act ordeining certain Laws for the Government of this Province within the following entry in the proceedings:

At a sessions of Generall Assembly at St. Maries on the 19th
March 1638 To the Honour of God and the wellfare of this
province was Enacted as followeth

An Act ordeining certain Laws for the Goverment of this
Province . . .

. . . .

104. See *supra* note 13.

105. 1 ARCHIVES, *supra* note 42, at 34.

106. *Id.* at 37.

107. *Id.* at 32-33. The requirement of three readings is assumed. The document setting forth that part of the rules of order for the 1639 session is blank, indicating that the words were torn away in the original. *Id.* at 33; see also *id.* at lvii (noting that the blanks indicate that words were torn away in the original). However, the fragment of the document remaining – "once read," [blank] then "ingrossed or utterly rejected," and later "put to the question" – seems consistent with a requirement of three readings, required in sessions of the General Assembly both before the 1638 session, *id.* at 11, and after the 1640 session, *id.* at 91, the session of 1639.

108. *Id.* at 39.

109. *Id.*

The freemen have assented
 The Lord proprietarie willeth that this be a Law
 verum recordum

John Lewger Secretary

March 19th 163[9]¹¹⁰

Ironically, portions of this omnibus Act, rather than the Act for the Liberties of the People from the same 1639 session of the Maryland General Assembly, may qualify as the "first American Bill of Rights."¹¹¹ When the 1642 session of the General Assembly revived certain temporary laws of the 1639 session, the laws were portions of the Act ordeining certain Laws for the Goverment of this Province, not the Act for the Liberties of the People.¹¹²

There is also scholarly support for the proposition that contrary to Schwartz's claim, Maryland's 1639 Act for the Liberties of the People was never duly enacted. One scholar concluded simply that the Act was not passed.¹¹³ Others reached the same conclusion and in addition, noted that the other 1639 measure, the Act ordeining certain Laws for the Goverment of this Province, was enacted at the same session of the General Assembly.¹¹⁴ Still other scholars omitted any reference to Schwartz's Act, but remarked on the enactment of the omnibus Act.¹¹⁵

110. *Id.* at 82-84. The date has been altered to reflect the "New Calendar" date. See *supra* note 88-92 and accompanying text; cf. 1 ARCHIVES, *supra* note 42, at 32, 81-82. "An Act For the Establishing the house of Assembly and the Laws to be made therein" was passed after one reading on February 25, the first day of the 1639 session, presumably before the rules of order, requiring three readings, were adopted. See *supra* note 107. Apparently, these two acts were the only ones enacted at the 1639 session.

111. See *infra* notes 175-214 and accompanying text.

112. 1 ARCHIVES, *supra* note 42, at 122.

113. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 350 (Neil H. Cogan ed., 1997).

114. 2 JOHN LEEDS BOZMAN, THE HISTORY OF MARYLAND, ITS FIRST SETTLEMENT IN 1633, TO THE RESTORATION, IN 1660, 115-17 (reprint 1968) (1837); WILLIAM HAND BROWNE, GEORGE CALVERT & CECILIUS CALVERT 101-03 (1890) [hereinafter BROWNE, GEORGE CALVERT]; EVERSTINE, *supra* note 92, at 49, 63-64; HANLEY, *supra* note 42, at 94-96, 108; J. MOSS IVES, THE ARK AND THE DOVE: THE BEGINNING OF CIVIL AND RELIGIOUS LIBERTIES IN AMERICA 161-64 (1936); DAVID W. JORDAN, FOUNDATIONS OF REPRESENTATIVE GOVERNMENT IN MARYLAND 1632-1715, 43 (1987); 7 LAWS OF MARYLAND FROM THE END OF THE YEAR 1799, app. (William Kilty et. al. ed., 1799-1800); STEINER, *supra* note 42, at 106-07; see also WILLIAM HAND BROWNE, MARYLAND: THE HISTORY OF A PALATINATE 45-47 (rev. ed. 1912) [hereinafter BROWNE, MARYLAND].

115. William T. Brantly, *The English in Maryland, 1632-1691*, in 3 NARRATIVE AND CRITICAL HISTORY OF AMERICA 530 (Justin Winsor ed., 1884); J.A. DOYLE, THE ENGLISH IN AMERICA: VIRGINIA, MARYLAND, AND THE CAROLINAS 395 (photo. reprint 1969) (1882); SUSAN ROSENFELD FALB, ADVICE AND ASCENT: THE DEVELOPMENT OF THE MARYLAND ASSEMBLY 1635-1689, 424 (1986); THEODORE C. GAMBRALL, STUDIES IN THE CIVIL, SOCIAL AND ECCLESIASTICAL HISTORY OF EARLY MARYLAND 98 (1893); 1 JAMES GRAHAME, THE HISTORY OF THE UNITED STATES OF NORTH AMERICA FROM THE PLANTATION OF THE BRITISH

c. Evidence of Non-Enactment Outweighs Evidence of Enactment

My conclusion is that the 1639 Act for the Liberties of the People was never duly enacted. I do not believe that the evidence of its due enactment¹¹⁶ can stand up to the evidence that it was not duly enacted.¹¹⁷ Additionally, the evidence that it was duly enacted can be explained away. First, as to the form of the 1639 Act as a due enactment – its title, enactment clause, and expiration date¹¹⁸ all might appear in a bill or draft of an act, particularly in one that had been read twice and engrossed (written) for a third reading,¹¹⁹ as well as in a duly enacted law.

Second, regarding the “thirty-eight Acts in full” of the 1639 legislative session, presumably including the Act for the Liberties of the People, referred to in the Calendar of State Archives in the book of laws,¹²⁰ the word “act” might have been used in a sense broader than “duly enacted law.” The proceedings of each session of the General Assembly were titled “Proceedings and Acts . . .,”¹²¹ and the proceedings of each day were titled “Acts of the . . . day”¹²² Additionally, at least one bill was referred to as an “act” on its first reading,¹²³ although the bill never proceeded to a second or third reading and was never passed.

Third, as to the inclusion of the Act for the Liberties of the People among the “Titles of Bills Passed,”¹²⁴ the titles of the other thirty-five bills reported in full in the book of laws,¹²⁵ although not read a third time or passed,¹²⁶ are also included among the “Titles of Bills Passed.”¹²⁷ Alternatively, the Calendar of State Archives and the “Ti-

COLONIES TILL THEIR ASSUMPTION OF NATIONAL INDEPENDENCE 310 (1846); BRADLEY T. JOHNSON, THE FOUNDATION OF MARYLAND AND THE ORIGIN OF THE ACT CONCERNING RELIGION OF APRIL 21, 1649, 50-51 (1883); C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 18 (2d ed. 1987); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 107 (reprint 1994) (5th ed. 1891); GEORGE BONIFACE STRATEMEIER, THOMAS CORNWALEYS COMMISSIONER AND COUNSELLOR OF MARYLAND 83 (1922). See generally THOMAS W. GRIFFITH, SKETCHES OF THE EARLY HISTORY OF MARYLAND 7-8 (1821).

116. See *supra* notes 96-104 and accompanying text.

117. See *supra* notes 105-16 and accompanying text.

118. See *supra* notes 96-97 and accompanying text.

119. See 1 ARCHIVES, *supra* note 42, at 37.

120. See *supra* note 98 and accompanying text.

121. See generally 1 ARCHIVES, *supra* note 42, at 25 (titling the 1639 session the proceedings and acts of the General Assembly of Maryland).

122. See, e.g., *id.* at 32, 34, 36-39.

123. *Id.* at 32 (providing the text of the “act touching the Payment of Tobacco’s”); see also *id.* at 6-7: “Acts” of the Lord Proprietor’s draft of laws were debated at the 1638 session of the General Assembly.

124. See *supra* note 99 and accompanying text.

125. 1 ARCHIVES, *supra* note 42, at 40-81.

126. *Id.* at 39 (noting the memorandum of John Lewger, Secretary of the Province).

127. *Id.* at 547-49 (noting the index to titles of bills passed).

ties of Bills Passed" may simply be in error, prepared by a different person than the editor of that volume of the Archives. The editor in a later work concluded that the "thirty-six acts . . . never passed to a third reading."¹²⁸

Fourth, regarding the 1723 legislative committee report, referring to acts of the General Assembly as evidence that English law had been received in provincial courts,¹²⁹ the report stated that the Act for the Liberties of the People was introduced on March 19, 163[9], a day on which proceedings contain no reference to the act.¹³⁰ The report also referred to seven other bills reported in full in the book of laws as "acts" of the same legislative session, although they were not read a third time or passed,¹³¹ as well as the duly enacted Act ordaining certain Laws for the Government of this Province.¹³²

Additionally, I do not believe that the scholars who argue that the 1639 Act for the Liberties of the People was duly enacted¹³³ can stand up to the scholarly support that it was not duly enacted.¹³⁴ The "clincher" seems to be that none of the scholars supporting due enactment mentioned, much less tried to explain, that the measure had only two readings in the General Assembly, not the required three, was never passed by that body, and was one of thirty-six bills set forth in the book of laws after a memorandum of the Secretary of the Province explaining that the bills were never read a third time and never passed.¹³⁵

However, one scholar, John Leeds Bozman, attempted to harmonize the thirty-six detailed bills, which failed to pass, with the one short omnibus Act that did pass.¹³⁶ Bozman's theory was that the omnibus Act was an abridgement of the thirty-six bills, and that the bills

128. BROWNE, GEORGE CALVERT, *supra* note 114, at 101; *see also* BROWNE, MARYLAND, *supra* note 114, at 45-47.

129. *See supra* note 101 and accompanying text.

130. 1 ARCHIVES, *supra* note 42, at 39. The proceedings of that day, the last day of the 1639 session, are followed by the memorandum of John Lewger, Secretary of the Province, which read that the thirty-six bills which followed, "were engrossed to be read the third time but were never read nor passed the house . . ." *Id.*; *see also id.* at 33-34 (noting the first reading of the Bill for the Liberties of the People as February 25, 1638); *id.* at 37 (noting the second reading of the Bill as March 6).

131. 34 ARCHIVES, *supra* note 57, at 663-67.

132. *Id.* at 667-68. For the due enactment of that law, *see supra* notes 109-10, 112 and accompanying text.

133. *See supra* notes 13, 102-04 and accompanying text.

134. *See supra* notes 114-16 and accompanying text.

135. *See supra* notes 105-08 and accompanying text.

136. BOZMAN, *supra* note 114, at 106; *see also* JORDAN, *supra* note 114, at 43 (noting that the omnibus Act "incorporated the substance of eleven of the earlier bills"); *cf.* HANLEY, *supra* note 42, at 89-97, 108 (stating that a committee of the General Assembly used a draft of the Proprietor's long and elaborate code of laws, proposed at the 1638 session, and again at the 1639 session, in drafting their own short and simple law, duly enacted in 1639 as An Act ordaining certain Laws for the Government of this Province).

illustrated or explained the Act, or that the Act directed attention to the bills, or made them obligatory in some measure.¹³⁷ Bozman supported his theory with four points. First, the *title* of the omnibus Act ordaining certain Laws for the Government of this Province alludes to other laws not included in the body of the Act.¹³⁸ Second, the omnibus Act in *form* resembles the Magna Carta, a collection of statutes; the omnibus Act is a collection of most of the thirty-six bills.¹³⁹ Third, the *subjects* covered by the omnibus Act and the thirty-six bills are nearly identical.¹⁴⁰ Fourth, in several reported instances, the bills (although unpassed) were *received and acted upon as laws* of the Province in force.¹⁴¹ Bozman did not speculate about why the thirty-six bills were not specifically passed by the General Assembly.¹⁴²

Ironically, Bozman's theory of the substantial congruence between the omnibus Act and the thirty-six unpassed bills is weakened by the conclusions of another scholar, Thomas O'Brien Hanley. Hanley's thesis stated that the thirty-six bills were used by a committee of the General Assembly in drafting the omnibus Act.¹⁴³ However, Hanley's reasoning for why the thirty-six bills never became law weakens Bozman's theory of congruence between the omnibus Act and the thirty-six bills. Hanley believed that the thirty-six bills constituted a draft of the Proprietor's proposed code of laws for the colony.¹⁴⁴ The Proprietor's long and elaborate¹⁴⁵ draft code favored the Proprietor, not the people.¹⁴⁶ The committee rejected the draft in favor of the omnibus Act ordaining certain Laws for the Government of this Province later adopted by the General Assembly.¹⁴⁷ That Act was a short and simple¹⁴⁸ compromise measure.¹⁴⁹ Thus, Hanley believed that

137. BOZMAN, *supra* note 114, at 106-07, 110-11, 139, 141, 145, 149, 157.

138. *Id.* at 106, 145-46; *see also id.* at 120, 157.

139. *Id.* at 107; *see also supra* note 139 and accompanying text. Indeed, one clause of the omnibus Act makes "an express reference to one of the thirty-six bills before mentioned . . . entitled 'An act for fees.'" BOZMAN, *supra* note 114, at 145.

140. *See* BOZMAN, *supra* note 114, at 106-07, 157; *see generally id.* at 106-160.

141. *Id.* at 111-12, 140-41.

142. *Id.* at 106, 141.

143. HANLEY, *supra* note 42, at 79-108.

144. *Id.* at 88-96; *see also supra* note 42.

145. HANLEY, *supra* note 42, at 94, 96.

146. *Id.* at 93-95; *see also id.* at 89-92.

147. 2 BOZMAN, *supra* note 114, at 106.

148. *Id.* at 96, 108.

149. *See id.* at 91-93, 97; *see also* STEINER, *supra* note 42, at 107 (noting that the Governor "accepted a short but comprehensive measure," after it became clear that the thirty-six complex bills would not pass). The compromise on the omnibus Act, without an official explanation for the failure of the thirty-six bills, may also reflect a need for speedy action. The 1639 session of the General Assembly, like the 1638 session before it, adjourned in late March. 1 ARCHIVES, *supra* note 42, at 22-23 (stating that the General Assembly read the bill for the fourth time on March 24, 163[8]); *id.* at 39 (stating that the General Assembly was to read the bill for the third time, but the

the omnibus Act was intentionally different than the thirty-six unpassed bills.

The general merits of Bozman's theory, that the omnibus Act is substantially congruent with the thirty-six unpassed bills, does not give much support to Schwartz's assumption that one of those bills, the Act for the Liberties of the People, was duly enacted. Bozman was one of the scholars who concluded that the Act for the Liberties of the People, like each of the thirty-six bills,¹⁵⁰ was not passed into law, but that the omnibus Act was.¹⁵¹ However, Bozman wrote that the Act for the Liberties of the People was "explanatory" of the fourth section of the omnibus Act,¹⁵² which provided that "[t]he Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England[.]"¹⁵³

This *bill* [Act for the Liberties of the People] appears to have been intended, not only as a recognition of the extent of the common and statute law of England to this province, but also as a *specification* of those particular clauses of magna charta by which the "rights and liberties" of the inhabitants were to be secured to them.¹⁵⁴

The Act for the Liberties of the People set forth rights from only one clause of the Magna Carta – Chapter 39 or what is now known as due process: "The Inhabitants of this Province . . . Shall not be imprisoned nor disseised or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province"¹⁵⁵ However, as Bozman recognized, "the [omnibus] *act*, more properly perhaps, by a *general* clause, recognizes the whole of such parts of magna charta as relate to the 'rights and liberties' of the people."¹⁵⁶ Thus, that short section of the omnibus Act, far from being an abridgement of the longer Act for the Liberties of the People, was a full statement of the rights and liberties of Englishmen. Bozman himself noted that Lord Edward Coke wrote that the "magna charta was . . . declaratory of the principal grounds of the fundamental laws of England"¹⁵⁷

bill was never read nor passed by the house on March 19, 163[9]). That time would have been near the New Year under the Julian calendar (March 25), the vernal equinox, and the beginning of Spring, which must have been a time for farmer legislators to think about planting. See *supra* note 90 and accompanying text.

150. BOZMAN, *supra* note 114, at 106 & n.†.

151. See *supra* notes 114-15 and accompanying text.

152. BOZMAN, *supra* note 114, at 115.

153. 1 ARCHIVES, *supra* note 42, at 83.

154. BOZMAN, *supra* note 114, at 116.

155. For the Act for the Liberties of the People, see *supra* text accompanying note 8.

156. BOZMAN, *supra* note 115, at 116.

157. *Id.* at 117 (citing 2 *Institutes* 1 Bl. Com. 127 proem); cf. SOURCES OF OUR LIBERTIES, *supra* note 13, at 9 ("Magna Carta . . . came to be regarded by the

The omnibus Act ordaining certain Laws for the Government of this Province also contained other more specific sections providing for rights of religious freedom, equal justice, and grand and trial juries in serious criminal cases.¹⁵⁸ Thus, the 1639 Maryland Act for the Liberties of the People was not the “first American Bill of Rights.”

IV. CLAIMING THE MINE

What was the “first American Bill of Rights,” if Maryland’s failed 1639 Act for the Liberties of the People was not? Does Maryland, nevertheless, get to keep the “bragging rights?”

Recall that Bernard Schwartz called Maryland’s 1639 Act “first,” because it preceded the Massachusetts Body of Liberties (1641).¹⁵⁹ Also, remember that the Mayflower Compact (1620) and the Fundamental Orders of Connecticut (1639) do not qualify as the “first American Bill of Rights,” because they did not contain guarantees of individual liberties.¹⁶⁰

Maryland has two other candidates for the “first American Bill of Rights” – a 1638 Act for the Liberties of the People¹⁶¹ and the 1639 Act ordaining certain Laws for the Government of this Province.¹⁶² These other acts can be considered as candidates for the “first American Bill of Rights.”

A. *Was Maryland’s 1638 Act for the Liberties of the People the “first American Bill of Rights?”*

In the 1638 session of the General Assembly, as well as in the 1639 session, there was an Act for the Liberties of the People. While only the title of the 1638 Act is reported in the proceedings of the General Assembly,¹⁶³ several scholars have speculated that the text of the 1638 Act is much like the 1639 Act.¹⁶⁴ The 1638 Act for the Liberties of the People, unlike the 1639 Act, was passed by the General Assembly.¹⁶⁵ However, the 1638 Act for the Liberties of the People was apparently vetoed by the Proprietor.¹⁶⁶

Accordingly, the 1638 Act for the Liberties of the People was not the “first American Bill of Rights,” as defined by Schwartz.¹⁶⁷ Because

colonists as a generic term for all documents of constitutional significance.”).

158. See *infra* notes 201-03 and accompanying text.

159. See *supra* notes 30-31 and accompanying text.

160. See *supra* note 30.

161. See *supra* note 42.

162. See *supra* note 42; see also *supra* notes 109-12, 137-59 and accompanying text.

163. See *supra* note 42; see also *infra* note 166 and accompanying text.

164. EVERSTINE, *supra* note 92, at 48-49; BOZMAN, *supra* note 114, at 115.

165. 1 ARCHIVES, *supra* note 42, at 15, 20.

166. EVERSTINE, *supra* note 92, at 48-49; BRANTLY, *supra* note 115, at 529; DOYLE, *supra* note 115, at 299; BOZMAN, *supra* note 114, at 67; see also *supra* note 42.

167. See *supra* notes 49-52 and accompanying text.

the Act was vetoed by the Proprietor, it was not fundamental law,¹⁶⁸ enforceable by the courts.¹⁶⁹ Because the text of the Act is lost, it cannot now be described as defining the rights protected.¹⁷⁰ If three scholars are correct, the 1638 Act was not drawn up by a representative legislative assembly,¹⁷¹ but was drawn up by the Proprietor in England.¹⁷²

B. Was Maryland's 1639 Act Ordeining Certain Laws for the Government of this Province the "first American Bill of Rights?"

At the same session of the General Assembly that the 1639 Act for the Liberties of the People failed to pass,¹⁷³ An Act ordeining certain Laws for the Government of this Province passed and was approved by the Proprietor.¹⁷⁴ This omnibus Act may well deserve the title, the "first American Bill of Rights." Indeed, some scholars have called it a "bill of rights."¹⁷⁵ Also, the Act's fourth section, by incorporating all the rights and liberties of the Great Charter of England,¹⁷⁶ may itself be a kind of "magna charta,"¹⁷⁷ which in modern times at least is synonymous with "bill of rights."¹⁷⁸

Schwartz does not mention the Act ordeining certain Laws for the Government of this Province, but the Act does seem to meet his description of the characteristics of a "bill of rights" in the American sense.¹⁷⁹

168. *Cf. supra* notes 53-63 and accompanying text (discussing the 1639 Act for the Liberties of the People).

169. *Cf. supra* notes 79-87 and accompanying text.

170. *Cf. supra* notes 64-69 and accompanying text.

171. *Cf. supra* notes 73-78 and accompanying text.

172. *See supra* note 42.

173. *See supra* notes 105-08 and accompanying text. *But see supra* notes 93-95 and accompanying text (noting that Schwartz assumed that the Act passed); *supra* notes 96-101 and accompanying text (noting evidence that the Act passed), *supra* notes 13, 102-04 and accompanying text (discussing the scholarly support for passage of the Act).

174. *See supra* notes 109-10 and accompanying text.

175. BROWNE, GEORGE CALVERT, *supra* note 114, at 102; BROWNE, MARYLAND, *supra* note 114, at 46-47; IVES, *supra* note 114, at 162-64; JOHNSON, *supra* note 115, at 50.

176. 1 ARCHIVES, *supra* note 42, at 83.

177. STORY, *supra* note 115, at 74; *see also* JOHNSON, *supra* note 115, at 50 (calling the act "the Magna Charta, the Petition of Right, and the Bill of Rights, all in one statute").

178. ENCARTA WORLD ENGLISH DICTIONARY 1085 (1999) (defining "bill of rights" as "a document that recognizes or guarantees rights, privileges, or liberties").

179. *See supra* notes 49-52 and accompanying text.

1. Declaration of Rights in a Fundamental Law

The omnibus Act was *a declaration of rights in a fundamental law*.¹⁸⁰ The Act was written. Its title, An Act ordeining certain Laws for the Goverment of this Province, suggests a basic code of laws. The form of the Act resembles the Magna Carta, a collection of statutes.¹⁸¹ Indeed, the fourth section of the Act invoked the Magna Carta: "The Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England[.]"¹⁸² As we shall see, the Act defined rights.¹⁸³ While the Act was ordinary legislation, not part of a charter, constitution, or other foundation document, the rights it described were, either fundamental or basic.¹⁸⁴ Those rights were intended to be enforceable "law," not just a declaration of principles.¹⁸⁵

However, the fundamentality of the Act was limited in two significant ways. First, the rights declared, like other provisions of the Act, were restricted in some way by the third section: "The Lord Proprietarie shall have all his rights and prerogatives."¹⁸⁶ Second, the Act was temporary, to continue only until the end of the next General Assembly, but not longer than three years.¹⁸⁷

2. Definition of the Rights Protected

The omnibus Act ordeining certain Laws for the Goverment of this Province *defined what rights were protected*.¹⁸⁸ The fourth section of the Act provided that "[t]he Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England."¹⁸⁹ That section recognized all of the parts of the Magna Carta relating to the rights and liberties of the people¹⁹⁰ or, perhaps, the rights and liberties of all the English constitutional documents, including the Petition of Right (1628).¹⁹¹ Specifically, Schwartz wrote that the key provisions of the Magna Carta (1215) were Chapter 12, no taxation except by the national assembly,¹⁹² and Chapter 39, trial by jury, prohibition of arbitrary arrest, full, free, speedy, and equal

180. Cf. *supra* notes 53-63 and accompanying text (discussing the 1639 Act for the Liberties of the People).

181. See *supra* note 140 and accompanying text.

182. 1 ARCHIVES, *supra* note 42, at 83.

183. See *infra* notes 189-204 and accompanying text.

184. See *infra* notes 190-203 and accompanying text.

185. See *infra* notes 210-14 and accompanying text.

186. 1 ARCHIVES, *supra* note 42, at 83.

187. *Id.* at 84. But cf. *supra* note 112 and accompanying text (discussing the revival of portions of the omnibus Act by the 1642 session of the General Assembly).

188. Cf. *supra* notes 64-69 and accompanying text (discussing the 1639 Act for the Liberties of the People).

189. 1 ARCHIVES, *supra* note 42, at 83.

190. See *supra* note 157 and accompanying text.

191. See *supra* note 158 and accompanying text.

192. 1 SCHWARTZ, *supra* note 1, at 6.

justice, and due process of law.¹⁹³ Other scholars have found additional rights in the Magna Carta, such as religious liberty in Chapter 1,¹⁹⁴ indictment by grand jury,¹⁹⁵ habeas corpus,¹⁹⁶ and prohibition on monopolies¹⁹⁷ in Chapter 39, and travel in Chapters 41 and 42.¹⁹⁸ Schwartz wrote that the Petition of Right (1628) declared the following rights as fundamental rights: a prohibition on taxes not laid by Parliament, habeas corpus, freedom from quartering of soldiers, and freedom from martial law.¹⁹⁹

While the fourth section of the omnibus Act generally recognized the Magna Carta and, perhaps, the Petition of Right, other sections of the Act provided for more specific rights. The first section provided for religious freedom: "Holy Churches within this province shall have all her rights and liberties."²⁰⁰ The fifth section, civil cases, and sixth section, criminal cases, required oaths of judges to administer "equall Justice to all persons without favour or malice of any one."²⁰¹ The sixth section also required indictment and trial by jury in serious criminal cases.²⁰² Thus, the rights protected were probably defined in more detail than they were in the 1639 Act for the Liberties of the People, although not in the detail of the later Massachusetts Body of Liberties (1641).²⁰³

3. Drawn Up by a Representative Assembly

The omnibus Act ordeining certain Laws for the Government of this Province was *drawn up by a representative legislative assembly*; it was not a grant from an English monarch.²⁰⁴ The Act was duly enacted.²⁰⁵ Of course, like the 1639 Act for the Liberties of the People, the omnibus

193. *Id.* at 6-7 (quoting EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 2-4 (reprint 1979) (1642)).

194. *See* EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 2-4 (reprint 1979) (1642).

195. *Id.* at 46, 50.

196. *Id.* at 53, 55.

197. *Id.* at 47.

198. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD 173 (reprint 1911) (2d ed. 1898).

199. *See* 1 SCHWARTZ, *supra* note 1, at 18-21.

200. 1 ARCHIVES, *supra* note 42, at 83; *see also* Steiner, *supra* note 42, at 107.

201. 1 ARCHIVES, *supra* note 42, at 83. *See generally* JOHNSON, *supra* note 115, at 56-57. While the phrase, "equall Justice," is expressly stated only in the fifth section, its omission from the sixth section may be inadvertent, because both sections include the succeeding, largely synonymous phrase, "without favour or malice of any one." 1 ARCHIVES, *supra* note 42, at 83.

202. 1 ARCHIVES, *supra* note 42, at 83.

203. *Cf. supra* notes 64-69 and accompanying text (comparing the 1639 Act for the Liberties of the People with the 1641 Massachusetts Body of Liberties).

204. *Cf. supra* notes 70-78 and accompanying text (discussing the 1639 Act for the Liberties of the People).

205. *See supra* notes 109-10 and accompanying text.

Act was one of ordinary legislation, not a constitution drawn up by a specially elected convention and ratified by the people.²⁰⁶ Additionally, the right of the General Assembly to legislate was granted, as a matter of grace, by royal charter.²⁰⁷ The assembly included not only representatives, but all gentlemen and the members of the Proprietor's Council, and the Act was subject to the Proprietor's veto.²⁰⁸

4. Rights Enumerated Are Enforceable by the Courts

The *rights enumerated* in the omnibus Act ordeining certain Laws for the Government of this Province were *enforceable by the courts*.²⁰⁹ The rights in the Act were not just declarations of moral principles, but were "laws," which could be enforced by the courts, even against the government in a very rudimentary system of checks and balances and judicial review.²¹⁰ Of course, the enforceability of the Act was limited for several reasons. It was subject in some way to the Proprietor's prerogative.²¹¹ Additionally, the Act was temporary in duration²¹² and was just ordinary legislation, it was not in a constitution.²¹³

Therefore, the Act ordeining certain Laws for the Government of this Province may well deserve the title, the "first American Bill of Rights."

V. CONCLUSION

Maryland may deserve the "bragging rights" for the "first American Bill of Rights."²¹⁴ That would not be, as Bernard Schwartz claimed, for the 1639 Maryland Act for the Liberties of the People,²¹⁵ which never passed in the Maryland General Assembly.²¹⁶ An earlier 1638 Maryland Act for the Liberties of the People also does not qualify because, although it passed the General Assembly, it was vetoed by the Proprietor.²¹⁷ However, the "first American Bill of Rights" may be the 1639 Maryland omnibus Act ordeining certain Laws for the Government of this Province, which passed the General Assembly and was approved by the Proprietor.²¹⁸

206. See *supra* notes 73-74 and accompanying text.

207. See *supra* notes 75-76 and accompanying text.

208. See *supra* notes 77-78 and accompanying text.

209. Cf. *supra* notes 79-87 and accompanying text (discussing the 1639 Act for the Liberties of the People).

210. See *supra* notes 79-82 and accompanying text.

211. See *supra* note 187 and accompanying text.

212. See *supra* note 188 and accompanying text.

213. See *supra* notes 181-85 and accompanying text.

214. See *supra* notes 7-87 and accompanying text.

215. See *supra* notes 7-13 and accompanying text.

216. See *supra* notes 93-158 and accompanying text.

217. See *supra* notes 162, 164-73 and accompanying text.

218. See *supra* note 175 and accompanying text.

The claim that the 1639 Maryland omnibus Act was the "first American Bill of Rights" is subject to some qualifications regarding the legislature, the general terms of the omnibus Act, and the specificity of the rights it guaranteed. The qualifications included: (1) that the *legislature* acted under a grant by royal charter; (2) that the General Assembly included not only representatives, but all gentlemen and the members of the Proprietor's Council; (3) that the Act was ordinary legislation, not a constitution drawn up by a specially elected convention and ratified by the people;²¹⁹ and (4) that the Act was subject to the Proprietor's veto.²²⁰ According to the *general terms of the Act*, the rights guaranteed were restricted in some way by the Proprietor's prerogative;²²¹ and the Act was temporary in duration.²²² The *specificity of the rights guaranteed* in the Act was lacking in the fourth section, which recognized all the rights and liberties of the Magna Carta,²²³ but did not provide specific rights as did other sections, which more specifically provided rights of religious freedom, equal justice, and indictment by grand jury and trial by jury in serious criminal cases.²²⁴

The Act ordaining certain Laws for the Government of this Province appears to satisfy Schwartz's description of the characteristics of a "Bill of Rights" in the American sense.²²⁵ The Act was a declaration of rights in a fundamental law.²²⁶ The Act defined what rights were protected.²²⁷ It was drawn up by a representative legislative assembly,²²⁸ and the rights enumerated were enforceable by the courts.²²⁹

Thus, because the 1639 Maryland Act ordaining certain Laws for the Government of this Province preceded the Massachusetts Body of Liberties (1641), the 1639 Maryland Act does seem to be the "first American Bill of Rights."²³⁰ Maryland gets to keep the "bragging rights."

219. See *supra* notes 207-09 and accompanying text.

220. See *supra* note 209 and accompanying text.

221. 1 ARCHIVES, *supra* note 42, at 83; see *supra* note 187 and accompanying text.

222. 1 ARCHIVES, *supra* note 42, at 84; see *supra* note 188 and accompanying text.

223. 1 ARCHIVES, *supra* note 42, at 83; cf. *supra* notes 191-200 and accompanying text (noting that invocation of the rights and liberties of the Magna Carta, generally, may have meant certain rights, specifically).

224. See *supra* notes 201-03 and accompanying text.

225. See *supra* notes 39-87 and accompanying text.

226. See *supra* notes 181-86 and accompanying text.

227. See *supra* notes 189-203 and accompanying text.

228. See *supra* notes 205-06 and accompanying text.

229. See *supra* notes 210-11 and accompanying text.

230. See *supra* notes 30-32, 160 and accompanying text.